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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ANDREA VARGAS et al., Plaintiffs and Appellants, v. YOLANDA GALLIZZI, Defendant and Respondent.	B287583 (Los Angeles County Super. Ct. No. BC638423)

APPEAL from a judgment of the Superior Court of Los Angeles County, James D. Otto, Judge. As to Garcia, the judgment is reversed and remanded with directions. As to Vargas, the judgment is affirmed in part, reversed in part and remanded with directions.

Pimentel Law and Gabriel J. Pimentel for Plaintiffs and Appellants Andrea Vargas and Ana Garcia.

Law Offices of Cleidin Z. Atanous, Cleidin Z. Atanous; Raffalow, Bretoi & Adams, Robert B. Reagan, Jr. and Ezra Siegel, for Defendant and Respondent.

Andrea Vargas and her adult daughter, Ana Garcia, sued Yolanda Gallizzi for personal injuries following an automobile accident. Gallizzi admitted fault, and the matter was tried to a jury on the issues of causation and damages. At the close of Vargas's and Garcia's case-in-chief, Gallizzi moved for a judgment of nonsuit on Garcia's action, asserting Garcia had failed to establish she suffered any injury proximately caused by the accident. Gallizzi also moved for a partial nonsuit on the issue of Vargas's future noneconomic damages, arguing Vargas had presented no expert testimony or other admissible evidence from which a jury could infer her existing pain and suffering was reasonably certain to continue in the future. The trial court granted both motions, and the defense rested without providing any evidence.

After the court found Vargas's proposed jury instruction on loss of use damages unsupported by the evidence, Vargas's action was submitted to the jury solely on the issues of causation and the amount, if any, of Vargas's past noneconomic injury. The jury awarded Vargas $15,000 in past noneconomic damages.

On appeal Garcia and Vargas primarily contend the court erred in granting Gallizzi's nonsuit motions. Vargas also contends the court erred in denying her request to instruct the jury on loss of use damages and excluding evidence relevant to her past noneconomic damages. Because the trial court erred in granting both nonsuit motions and refusing to instruct on Vargas's loss of use damages, we reverse the judgment and remand for a retrial limited to the amount of Garcia's past and future noneconomic damages, if any, proximately caused by the accident, and the amount of Vargas's loss of use damages and future noneconomic damages, if any, proximately caused by the

accident. We reject Vargas's additional claims of evidentiary and instructional error relating to past noneconomic harm and affirm the jury's award to Vargas of $15,000 in past noneconomic damages.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Accident and Lawsuit*

In December 2012 Gallizzi's red sports car rear-ended Vargas's car. Vargas, then 74 or 75 years old, was in the driver's seat; Garcia, then 57 years old, the front passenger's seat. Gallizzi's car was travelling 40 miles per hour at the time of impact; Vargas's car was stopped, as was the traffic ahead of her. The force of the collision propelled Vargas's car into the truck in front of her. None of Vargas's airbags deployed. Vargas's car was declared a total loss for insurance purposes. Both Vargas and Garcia were taken by ambulance to the hospital, where they were examined and released later that day.

Vargas and Garcia sued Gallizzi for negligence. Gallizzi admitted fault. The actions were tried together to a jury on the issues of causation and damages.

2. *The Evidence at Trial on Causation and Damages*

a. *Vargas's evidence*

One week after the accident Vargas saw her treating physician, Dr. Oona Kahn, complaining of pain in her neck and upper back. Dr. Kahn prescribed anti-inflammatory and pain medications. According to Vargas, because Dr. Kahn's office at Cedars-Sinai Medical Center near Beverly Hills was far from her home in Covina and she no longer had a car, it was much easier to seek treatment from a local chiropractor than to follow-up with Dr. Kahn. Vargas obtained chiropractic treatment from January 14, 2013 until May 2013, but continued to experience

headaches along with neck and upper back pain. She testified the treatment did not help her pain. In fact, she believed, it had become worse.

In August 2013, while on a trip with her family to Las Vegas, a mugger snatched Vargas's purse and threw Vargas to the ground. Vargas landed on her buttocks. After she returned home, Vargas saw Dr. Kahn and reported the attack had caused pain in her buttocks. Vargas testified she did not tell Dr. Kahn about the continuing pain in her neck or upper back at that time because the purpose of the visit was to evaluate the injuries she had sustained as a result of the mugging.

In November 2013 Vargas returned to Dr. Kahn, complaining of high blood pressure and neck pain; at some point in 2014 she sought treatment from Dr. Kahn's colleague for lower back pain. She continued to see her treating physicians at Cedars-Sinai but did not discuss her neck and upper back pain with them because it had become clear to her that her doctors attributed that pain to old age or arthritis and would only give her additional medication.

In 2016 Vargas's attorney referred her to Jason Groomer, an osteopathic physician. Dr. Groomer conducted a physical examination, ordered a diagnostic MRI and prescribed physical therapy to address Vargas's continuing neck and upper back pain. Dr. Groomer opined at trial that Vargas had suffered a disc herniation in the crash and, by the time he saw her in 2016, she was continuing to suffer from spinal strain attributable to that injury. Dr. Groomer also stated the Las Vegas mugging, as Vargas described it, could have resulted in lower back pain; it would not have caused or contributed to her neck and upper back injuries that he believed were caused by the crash.

The court excluded all of Vargas's and Garcia's medical records because Vargas and Garcia had failed to establish the foundational requirements to admit them into evidence under an exception to the hearsay rule. The court permitted counsel to use the medical records to refresh witnesses' recollections when appropriate. In addition, while allowing Dr. Groomer to testify as to matters within his personal knowledge, the court prohibited him from relating specific facts he had obtained solely from reviewing Vargas's records from other physicians. Dr. Groomer opined on Vargas's existing injuries but did not offer any testimony as to whether, or how long, Vargas's pain would continue in the future.

Vargas's son and granddaughter each testified that Vargas had been very active before the accident and enjoyed traveling and exercising. Since the accident, however, those activities had stopped. Vargas had difficulty walking and was unable to assist her son with home improvement projects as she had prior to the accident.

Vargas testified she was without a car for a time due to the accident and relied on public transportation. Five or six times she rented a car, primarily to attend medical appointments.

b. *Garcia's evidence*

Garcia, who is developmentally disabled, deaf and mute, testified at trial after being found competent by the court. With the assistance of a sign language interpreter, Garcia offered very brief testimony about the crash. She testified she had hurt her "whole head" in the accident. The accident caused her to feel nervous, and she remains frightened and anxious every time she rides in a car. Vargas and Vargas's son testified that, since the

accident, Garcia has been afraid to be in a car, rides in one only when absolutely necessary, and is too afraid to sit in a back seat.

Dr. Groomer did not examine Garcia, and no treating physician or medical expert testified as to whether Garcia had suffered any injuries caused by the accident.

3. *Gallizzi's Motions for Full and Partial Nonsuits*

After Vargas and Garcia rested their cases, Gallizzi moved pursuant to Code of Civil Procedure section 581c[1] for a nonsuit on Garcia's action, arguing Garcia had failed to provide expert testimony or other admissible medical evidence to support her claim that the accident had proximately caused her any physical or psychological injury, let alone that any injury, including pain and suffering, was reasonably certain to continue in the future. As to Vargas, Gallizzi moved for a nonsuit on the limited issue of Vargas's future noneconomic damages, arguing that, without expert testimony, Gallizzi had failed to demonstrate to a reasonable degree of medical certainty that she would suffer noneconomic injury in the future.

In opposition to the motions, Garcia argued she was seeking only noneconomic damages, for which expert testimony was unnecessary. Vargas similarly argued expert testimony was not necessary to establish her noneconomic damages were reasonably certain to continue in the future.

The trial court granted both nonsuit motions. As to Garcia, the court ruled she had not made a prima facie case for past or future noneconomic damages proximately caused by the accident. As to Vargas, the court explained there was "no testimony as to

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[1] Statutory references are to this code unless otherwise stated.

how long [Vargas's] injuries were going to last, whether she's going to need treatment for a lifetime [and] the degree and extent of those injuries." Because that determination would be entirely speculative, the court ruled, it was not appropriate for the issue to go to the jury.

4. *The Jury's Verdict*

Following the court's rulings on Gallizzi's motions for full and partial nonsuits, the defense rested without introducing any evidence. The trial court refused Vargas's request to instruct the jury on loss of use damages relating to her car, the only economic damages Vargas sought in the action, concluding Vargas had not presented sufficient evidence to support the instruction. The case was submitted to the jury to resolve issues of causation and past noneconomic injury. In a special verdict the jury found causation and awarded Vargas $15,000 in past noneconomic damages.

DISCUSSION

1. *Governing Law and Standard of Review*

After presentation of the plaintiff's opening statement or case-in-chief, the defendant may move for a judgment of nonsuit. (§ 581c, subd. (a).) "If it appears that the evidence presented, or to be presented, supports the granting of the motion as to some but not all of the issues involved in the action, the court shall grant the motion as to those issues and the action shall proceed on the issues remaining." (§ 581c, subd. (b).)

"A motion for nonsuit allows a defendant to test the sufficiency of the plaintiff's evidence before presenting his or her case. Because a successful nonsuit motion precludes submission of plaintiff's case to the jury, courts grant motions for nonsuit only under very limited circumstances. [Citation.] A trial court must not grant a motion for nonsuit if the evidence presented by

the plaintiff would support a jury verdict in the plaintiff's favor. [Citations.] [¶] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to the plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the [plaintiff's] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference [that] may be drawn from the evidence in plaintiff['s] favor. . . ."'" (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 838-839; accord, *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 347; *Lacagnina v. Comprehend Systems, Inc.* (2018) 25 Cal.App.5th 955, 967.)

On appeal from a judgment following the granting of a nonsuit, the reviewing court similarly views the evidence most favorably to the plaintiff and most strongly against the defendant and resolves all presumptions, inferences, and doubts in the plaintiff's favor. A nonsuit may only be upheld on appeal when, drawing all reasonable inferences in favor of the nonmoving party, the court determines the moving party was entitled to resolution of the issue, claim or action in his or her favor as a matter of law. (*Carson v. Facilities Development Co., supra,* 36 Cal.3d at p. 839; *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 664.)

2. *The Court Erred in Granting Gallizzi's Motions for Full and Partial Nonsuits*

The elements of a prima facie case of negligence are well settled: The plaintiff must establish the defendant owed a duty to the plaintiff; the defendant breached that duty; and the defendant's breach proximately caused the plaintiff damage. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106; *Paz v. State of California* (2000) 22 Cal.4th 550, 559.) In

personal injury actions the element of compensatory damages includes both economic and noneconomic harm. Noneconomic harm is a broad category that encompasses physical pain, fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, inconvenience, embarrassment, apprehension, loss of enjoyment of life, terror and ordeal. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893; *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 764 (*Loth*).)

a. *Garcia carried her burden to establish a prima facie case that her past noneconomic damages were proximately caused by Gallizzi's negligence*

Gallizzi argued, and the trial court agreed, that nonsuit as to Garcia's action was proper because Garcia had failed to provide expert testimony or medical evidence sufficient to demonstrate that Garcia's purported noneconomic injury—her automobile-related fright and anxiety—was caused "to a reasonable degree of medical probability" by Gallizzi's negligence. (See, e.g., *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1336 ["Ordinarily, a plaintiff may establish proximate cause without the testimony of an expert by providing evidence that indicates the defendant's conduct was a substantial factor in producing plaintiff's damages. [Citation.] However, '[t]he law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case'"]; *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118 [same].)

If Garcia were seeking to hold Gallizzi liable for a complex medical injury or if there were multiple potential causes for her

injuries, we might agree that expert testimony was necessary before a jury could reasonably conclude those injuries more probably than not resulted from the automobile accident. Here, however, there was testimony that Garcia was afraid to ride in a car after a rear-end collision at a speed of 40 miles per hour. We have no difficulty concluding that, in these circumstances, expert testimony was not required to submit the issue of Garcia's noneconomic damages to the jury. (See *Loth*, *supra*, 60 Cal.App.4th at p. 767 [expert testimony not required to prove noneconomic damages; "[a] plaintiff's loss of enjoyment of life is not 'a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact'"]; *Martin v. Siller* (1936) 17 Cal.App.2d 153, 158 [expert testimony on causation was not required in this simple negligence action; "[c]ommon reasoning tells us that if the eye strikes the end of a pipe, and an injury to the eye results, expert testimony is unnecessary"]; see generally Evid. Code, § 801, subd. (a) [expert testimony required only when matter is beyond the common experience of laypersons].)

b. *Vargas carried her burden to prove future noneconomic harm*

To support her motion to remove the question of Vargas's future noneconomic damages from the jury, Gallizzi argued, and the trial court agreed, Vargas had failed to demonstrate with expert testimony or other admissible evidence she was reasonably certain to suffer noneconomic harm in the future. (See *Roedder v. Rowley* (1946) 28 Cal.2d 820, 822 ["[i]n a personal injury action, the plaintiff is entitled to recover such damages as will compensate him for the loss incurred up to the time of trial and also the loss reasonably certain to occur in the future"]; accord, *Green Wood Industrial Co. v. Forceman Internat.*

Development Group, Inc. (2007) 156 Cal.App.4th 766, 777; *Oliveira v. Warren* (1938) 24 Cal.App.2d 712, 716 ["[w]here an injury is subjective and of such a nature that laymen cannot, with reasonable certainty, know whether or not there will be future pain and suffering, expert evidence by men [or women] learned in human anatomy must be offered who can testify either from an examination of the patient, by history of the case, or by hypothetical question, that the plaintiff with reasonabl[e] certainty may be expected to experience future pain as a result of the established injury"]; see also CACI No. 3905A [to recover future noneconomic damages, the plaintiff "must prove that [she] is reasonably certain to suffer that harm"].)

To carry her burden of proof on the question of future noneconomic harm, Vargas offered expert testimony that her existing pain was caused by the accident; and she testified the pain that began at the time of the accident had continued, without significant improvement, up to and during the trial. No further evidence or expert testimony was required to make a prima facie case that Vargas's noneconomic injury, caused by the accident and existing at the time of trial, was reasonably certain to occur in the future. (See *Loper v. Morrison* (1944) 23 Cal.2d 600, 611 ["There was testimony, however, that at the time of trial plaintiff was still suffering from headaches, nervousness and pain. This evidence tended to prove future damages and was sufficient to justify" an instruction on future noneconomic damages]; *Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 98 ["[i]t is for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case"]; *Parsell v. San Diego Consol. Gas & Electric Co.* (1941) 46 Cal.App.2d 212, 216 ["This case was tried nearly two

years after the happening of the accident and this respondent testified that she had little, if any, use of her hand and arm and that she was unable to fasten her clothes or tie her shoestrings. She further testified that she had suffered continuously and was still suffering, that she still had pain in her wrist, elbow and shoulder . . . . We think this evidence was sufficient to justify the giving of the instruction" on future noneconomic damages"].)

Gallizzi alternatively asserts there was no evidence of how long Vargas's noneconomic injury was likely to continue and argues that evidentiary failing, as the trial court found, made the issue of future damages too speculative to submit to a jury. (See *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1461 [nonsuit proper when plaintiff's evidence of damage caused by legal malpractice too speculative]; see generally *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 [damages that are "'speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery"'].) However, as discussed, a jury could reasonably infer from Vargas's evidence that her existing noneconomic injury was reasonably certain to continue in the foreseeable future. Quantifying that harm, a task going to the weight of the evidence presented, was inherently a jury question. The court erred in removing that issue from the jury as too speculative. (See *Beagle v. Vasold* (1966) 65 Cal.2d 166, 167 ["'[t]ranslating pain and anguish into dollars can, at best, be only an arbitrary allowance, not a process of measurement"'; the court can only instruct the jury to "'allow such amount as in their discretion they consider reasonable'" for that purpose]; *Loth, supra*, 60 Cal.App.4th at p. 768 ["[j]ust as no judge may give the jury a standard for determining pain and suffering damages [citation], no expert may supply a formula for

computing the value of life and, by extrapolation, the value of the loss of enjoyment of life[;] [t]hat calculation, at present, must be left to the sound discretion of the jury"]; CACI No. 3905A ["No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense"].)

c. *Garcia carried her burden to make a prima facie showing of future noneconomic harm*

Having moved in the alternative for a partial nonsuit on Garcia's purported future noneconomic damages, Gallizzi argues that, at the very least, a nonsuit on that question would have been appropriate and that issue should be excluded from the jury's consideration in the event of a retrial. However, Garcia and her brother testified her automobile-related stress and anxiety had continued unabated since the accident. A jury may believe them or not, but expert testimony was not necessary to establish a prima facie case that Garcia was reasonably certain to suffer future noneconomic harm.

In sum, both Garcia and Vargas carried their burdens to present a prima facie case of negligence against Gallizzi. The court erred in granting a judgment of nonsuit on Garcia's negligence action and in removing from the jury's consideration the issue of Vargas's future noneconomic harm proximately caused by the accident.

3. *The Court Erred in Refusing To Instruct the Jury on Loss of Use Damages*

A party in a civil case is, upon request, entitled to correct jury instructions on every theory of the case supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572; *Olive v. General Nutrition Centers, Inc.* (2018)

30 Cal.App.5th 804, 813.) We review the record de novo to determine whether any substantial evidence supported giving a refused jury instruction. (*Evans v. Hood Corp.* (2016) 5 Cal.App.5th 1022, 1045; *Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495.)

Vargas contends the court erred in refusing her request to instruct the jury with CACI No. 3903M—loss of use of personal property—with respect to her car.[2] In refusing to give the instruction, the court explained Vargas's loss of use damages were speculative because "there wasn't anything put in [evidence] other than at some point in time, years, she rented a car. We don't have any time as to whether she reasonably needed to rent that car because she had not been compensated for the car and whether those are proper damages. It calls for speculation of the jury and I w[ill] not allow it." In defending the ruling, Gallizzi emphasizes Vargas's admission at trial that she was compensated for the value of her car at some unspecified time and thus failed to demonstrate she reasonably needed to rent the car when she did.

Vargas testified (1) she had rented a car five or six times to attend important medical appointments (2) the rental cost was $20 to $30 each time; and (3) she deliberately selected the most economical price because that was all that she could afford, testimony that indicated she had not yet been compensated for the value of her car. That evidence alone, if believed, would

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[2] CACI No. 3903M provides, "To recover damages for loss of use, [*name of plaintiff*] must prove the reasonable cost to rent a similar [*item of personal property*] for the amount of time reasonably necessary to repair or replace the [*item of personal property*]."

support an award for some loss of use damages proximately caused by Gallizzi's negligence. The court erred in refusing to give the CACI No. 3903M instruction. Because it is reasonably probable the error affected the amount of damages awarded, it was not harmless; and remand for a retrial on past economic loss limited to loss of use damages proximately caused by the accident is required. (See *Soule v. General Motors Corp., supra*, 8 Cal.4th at p. 580 ["[i]nstructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict'"]; *Strouse v. Webcor Construction, L.P.* (2019) 34 Cal.App.5th 703, 713 [same].)

4. *Vargas Has Not Demonstrated Instructional Error Relating to Past Noneconomic Damages*

Vargas contends the court erred in denying her request to instruct the jury with CACI No. 3927 (aggravation of a preexisting condition or disability)[3] and CACI No. 3928 (unusually susceptible plaintiff),[4] insisting there was substantial

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[3] CACI No. 3927 provides, "[*Name of plaintiff*] is not entitled to damages for any physical or emotional condition that [*he/she*] had before [*name of defendant*]'s conduct occurred. However, if [name of plaintiff] had a physical or emotional condition that was made worse by [*name of defendant*]'s wrongful conduct, you must award damages that will reasonably and fairly compensate [*him/her*] for the effect on that condition."

[4] CACI No. 3928 provides, "You must decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for all damages caused by the wrongful conduct of [*name of defendant*], even if [*name of plaintiff*] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury."

evidence to support each instruction: She was an elderly woman who suffered from hypertension and age-related ailments prior to the accident. However, Vargas offered no evidence of preexisting conditions involving her neck or upper back that were purportedly aggravated by the accident. Although Vargas asserts there were some statements in her medical records indicating she had complained of headaches prior to the accident and those headaches had become more severe after the accident, those records were not in evidence. As for being an unusually susceptible plaintiff, Vargas's theory at trial was that she was a very active woman prior to the accident. The trial court did not err in concluding there was no substantial evidence to justify either instruction.

5. *Vargas Has Not Demonstrated the Trial Court Erred in Excluding Evidence Relating to Past Noneconomic Damages*

a. *Family photographs*

Vargas sought to introduce 37 family photographs to support her contention she was an active woman who had traveled extensively prior to the accident. The court admitted the first two family photographs Vargas's counsel identified and excluded the rest as cumulative and unduly time consuming under Evidence Code section 352. On cross-examination Vargas acknowledged the two photographs admitted into evidence were more than 20 years old. Vargas's counsel did not thereafter seek to introduce other, more recent photographs.

During closing argument Vargas's counsel urged the jury not to give great weight to the age of the two photographs because he had been prohibited from introducing more recent ones. The court sustained Gallizzi's objection to that comment. In his closing argument Gallizzi's counsel responded, "The

plaintiff's attorney mentioned that I made an issue out of these photographs. These were the two photographs that they showed of the family. . . . It was interesting that they were taken 20 years ago. So they had to go back 20 years to give you a before-the-accident scenario. . . . They could have showed you a photograph six months before the accident. They could have showed you a photograph a year before the accident, but they had to go back 20 years."

Vargas contends the court abused its discretion in excluding most of her family photographs and argues the error was prejudicial, as demonstrated by Gallizzi's counsel's emphasis in closing argument on the age of the two photographs in evidence. We review the trial court's decision to admit or exclude evidence for abuse of discretion; the ruling will not be disturbed absent a showing the trial court acted in an arbitrary or irrational manner resulting in a miscarriage of justice. (*People v. Powell* (2018) 5 Cal.5th 921, 951; *Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476; *Austin B. v. Escondido School Dist.* (2007) 149 Cal.App.4th 860, 885.)

Vargas's contention the court erred lacks merit. The court reasonably ruled two photographs were sufficient to bolster Vargas's uncontested assertion that she was an active traveler prior to the accident, and that presenting the jury with so many family photographs for the same purpose was unnecessarily cumulative. Vargas has not demonstrated how that ruling, directed to preventing an unwarranted consumption of time, was an abuse of the court's broad discretion under Evidence Code section 352 (*People v. Allen* (1986) 42 Cal.3d 1222, 1257 [photographic evidence on an uncontested issue not particularly probative]; *People v. Thuss* (2003) 107 Cal.App.4th 221, 234 [not

an abuse of court's discretion to exclude photographs cumulative of other evidence relating to witness credibility]), let alone that it resulted a miscarriage of justice. (See Evid. Code, § 354.) To the extent Vargas challenges the failure to admit more recent photographs, the fault was her counsel's, not the court's. Vargas's counsel did not explain to the court that the photographs admitted into evidence were old, nor did he request at any point to introduce more recent photographs instead; and there is no indication in this record that such a request would have been futile. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1319 [failure to raise argument in trial court results in forfeiture on appeal]; *People v. Cornejo* (2016) 3 Cal.App.5th 36, 56 [counsel's failure to "press[] for a ruling on the matter" of admissibility of evidence forfeited the issue on appeal].)

b. *Question on direct examination*

On direct examination Vargas testified her son had purchased a scooter for her. When Vargas's counsel asked "her understanding as to why her son had purchased the scooter," Gallizzi objected on relevance grounds; and the court sustained the objection. Vargas contends the court erred: Had she been permitted to answer the question, she argues, she would have explained the scooter was necessary to help with her decreased mobility, evidence that was directly relevant to her claimed injuries.

At the threshold, because the question, as framed, called either for speculation or hearsay, neither of which is admissible (see Evid. Code, §§ 702, 1200, subd. (a)), the objection was properly sustained, albeit for the wrong reason. (Cf. *People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12 ["[a]lthough our theory of admissibility differs from that of the trial court, 'we

review the ruling, not the court's reasoning, and, if the ruling was correct on any ground, we affirm'"]; see generally *People v. Zapien* (1993) 4 Cal.4th 929, 976 [""'a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason'""].) Instead of reframing his question to ask Vargas why she used a scooter, counsel moved to a different line of inquiry. Once again, that was counsel's error, not the court's. In any event, Vargas testified she had difficulty walking since the accident, and she had obtained a scooter. Vargas has not demonstrated error or prejudice.

DISPOSITION

The judgment is reversed, and the matter remanded for a retrial on (1) the amount of Garcia's past and future noneconomic damages, if any, proximately caused by the accident; and (2) the amounts of Vargas's loss of use damages and future noneconomic damages, if any, proximately caused by the accident. The jury's award of $15,000 in past noneconomic damages to Vargas is affirmed. Garcia and Vargas are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.